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January 24, 2006

**Ex Parte**

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of Petition for Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges*, WC Docket No. 05-276

Dear Ms. Dortch:

On behalf of AT&T Inc. ("AT&T"), I am writing to notify the Commission of a recent decision of the United States District Court for the Northern District of Texas, *see* Memorandum Order, *AT&T Corp. v. Transcom Enhanced Services, LLC*, No. 3: 05-cv-1209-B (N.D. Tx.) (attached). There, the district court vacated as moot a decision of the bankruptcy court that had ruled that Transcom Enhanced Services, LLC ("Transcom") is an "enhanced service provider" that is exempt from access charges when it uses the Internet Protocol ("IP") to transmit long-distance telephone calls. Transcom is an "IP-in-the-middle" provider that, like PointOne, uses IP to transmit long-distance telephone calls that originate and terminate on the PSTN,[1] and indeed PointOne relied upon the bankruptcy court's decision in claiming that its own use of IP turns the calls it carries into enhanced services and thereby exempts them from access charges.[2] The district court's vacatur of the bankruptcy court's opinion is accordingly relevant to the Commission's consideration of AT&T's petition in this docket.

Yours truly,

Colin S. Stretch

cc: Jennifer McKee

[1] *See, e.g.*, Global Crossing Telecommunications, Inc. Comments at 2 n.5 (Nov. 10, 2005) ("Transcom, in all relevant respects, offers the same type of IP transport services as does [PointOne].").

[2] *See* PointOne Comments at 12 (Nov. 10, 2005).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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|---|---|---|
| **AT&T CORP. AND SBC TELCOS,** | § | |
| | § | |
| **Appellants,** | § | |
| | § | |
| **v.** | § | **CIVIL ACTION NO. 3: 05-CV-1209-B** |
| | § | |
| **TRANSCOM ENHANCED SERVICES, LLC, et al.,** | § | |
| | § | |
| **Appellees.** | § | |

**MEMORANDUM ORDER**

Before the Court is Appellant AT&T Corp.'s Motion to Dismiss Appeal and Vacate Bankruptcy Court Order ("Motion to Dismiss") (no. 27), filed August 26, 2005. For the reasons stated below, the Court GRANTS the motion.

## I. Factual and Procedural Background

To put AT&T's motion to dismiss in perspective, a brief description of the parties in this case and the events that have transpired in the bankruptcy court is in order. Appellee Transcom is a wholesale transmission services provider of an Internet Protocol-based network which allows its customers – mainly long-distance voice and data carriers – to transmit long distance calls. (April 28, 2005 Memorandum Opinion ["MO"] at 1-2). On July 11, 2003, Transcom entered into a "Master Agreement" with AT&T, a local exchange and long distance voice and data carrier, whereby AT&T was to provide local termination services to Transcom. (*Id.* at 3; AT&T Appellant's Brief ["AT&T App. Brief"] at 2-3). Appellants the SBC Telcos are local exchange carriers that originate and terminate long distance voice calls for carriers who do not have direct connections to end users.

(MO at 3). The SBC Telcos assess access charges for their services. "Enhanced Service Providers" ("ESP"), however, are exempt from such charges.[1]

On April 21, 2004, in a separate declaratory proceeding involving AT&T and SBC, the FCC entered an order declaring that a certain type of telephone service provided by AT&T did not qualify as an "enhanced service", thus rendering AT&T liable for access charges. (MO at 3). AT&T contends that the order makes clear that the FCC's ruling applies not only to AT&T, but to other parties providing similar phone services. (AT&T App. Brief at 3). Based on the FCC's order, AT&T decided to discontinue its service to Transcom, asserting that Transcom's services, which it believes are substantially similar to its own, are also subject to access charges. (MO at 3). In making the decision to suspend service to Transcom, AT&T relied on a provision in the Master Agreement purportedly allowing AT&T to discontinue service reasonably believed to be in violation of any laws and regulations. (*Id.*). For its part, Transcom maintains that it qualifies as an ESP, and is thus exempt from paying access charges, because it provides "enhanced" information services as opposed to basic telecommunication services.

On February 18, 2005, Transcom filed for Chapter 11 bankruptcy in the Northern District of Texas. Soon thereafter Transcom moved to assume the Master Agreement in the bankruptcy court. AT&T did not oppose the assumption provided that Transcom pay an appropriate "cure amount" and that the bankruptcy court not decide the question of whether Transcom qualifies as an ESP. According to AT&T, that issue is instead reserved for the courts of New York to decide

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[1] The FCC has distinguished between "basic service" and "enhanced service." "A basic service is transmission capacity for the movement of information without net change in form or content. By contrast, an enhanced service contains a basis service component but also involves some degree of data processing that changes the form or content of the transmitted information." (FCC Order, WC Docket No. 02-361, at 3).

pursuant to a forum selection clause contained in the Master Agreement.

The bankruptcy court entered a Memorandum Opinion and Order Granting Debtor's Motion to Assume on April 28, 2005. In its ruling the bankruptcy court examined whether Transcom met the requirements of 11 U.S.C. § 365. Under 365(b)(1), a debtor that has previously defaulted on an executory contract may not assume the contract unless the trustee:

> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365. Because only Transcom offered any evidence of a cure amount, totaling $103,262.55, the bankruptcy court accepted that amount, stating that "upon payment of the Cure Amount Debtor's Motion [to Assume] should be approved by the Court, provided the Debtor can show adequate assurance of future performance." (MO at 5). AT&T maintains that the bankruptcy court should have stopped there. The bankruptcy court, however, went further, concluding that it must also determine whether, in assuming the Master Agreement, Transcom was exercising proper business judgment. The bankruptcy court's concern was that Transcom's assumption of the contract could expose it to certain administrative claims AT&T had threatened to file to recover access charges allegedly owing under the Master Agreement should Transcom fail to qualify as an ESP.

The bankruptcy court proceeded to find that Transcom's "service is an 'enhanced service' not subject to the payment of access charges" and that, therefore, "it is within [Transcom's] reasonable business judgment to assume the Master Agreement." (MO at 12). It is this finding that is the subject of the present appeal to this Court. AT&T and the SBC Telcos each filed separate

appeals of the bankruptcy court's order in early May 2005. Those appeals were consolidated on July 6, 2005. Both AT&T and the SBC Telcos ask this Court to vacate the bankruptcy court's ruling to the extent it determined that Transcom is an ESP, claiming that the bankruptcy court lacked jurisdiction to decide that issue.[2]

On August 26, 2005, AT&T filed a motion to dismiss the appeal of the bankruptcy court's order on the ground that it is now moot because Transcom failed to pay the Cure Amount within the 10-day time frame established by the bankruptcy court's Memorandum Opinion and order. Because, under the bankruptcy court's rulings, Transcom's entitlement to assume the Master Agreement was dependent on the payment of the Cure Amount, AT&T contends that Transcom's failure to timely make payment prevents assumption and extinguishes any live controversy presented by its appeal. Transcom filed an opposition to AT&T's Motion to Dismiss. The SBC Telcos filed a response to AT&T's motion setting forth its agreement with AT&T that, should this Court find the present appeal moot, it should vacate the bankruptcy court's order.

## II. Analysis

The United States Constitution empowers federal courts to hear only live cases and controversies. U.S. CONST. art. III, § 2; In re *Sullivan Cent. Plaza, I, Ltd.*, 914 F.2d 731, 735 (5th Cir. 1990). "An appeal is properly dismissed as moot when . . . an appellate court lacks the power to provide an effective remedy for an appellant should it find in his favor on the merits." *Id.* Federal courts must eschew rendering advisory opinions. *C&H Nationwide, Inc. v. Norwest Bank Texas NA*, 208 F.3d 490, 493 (5th Cir. 2000); 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND

[2] The SBS Telcos also argue that the bankruptcy court, assuming it had jurisdiction to decide the question, erred in finding that Transcom qualifies as an ESP.

PROCEDURE § 3533 ("Courts do not wish to make law nor to waste their limited resources, simply to satisfy curiosity or a naked desire for vindication.").

AT&T argues that a live controversy no longer exists between it and Transcom because Transcom forfeited its right to assume the Master Agreement by failing to pay the Cure Amount within 10 days of the bankruptcy court's order, as directed by the bankruptcy court. There is no question that the bankruptcy court's decision to grant Transcom's motion to assume was conditioned upon the payment of the Cure Amount to AT&T, as its rulings are fraught with conditional language. *See e.g.* Order Granting Debtor's Motion to Assume ("Debtor may assume the Master Agreement *upon the payment* of the Cure Amount"); MO at 12-13 ("*To assume* the Master Agreement, the Debtor must pay this Cure Amount to AT&T within 10 days of the entry of the Court's order on this opinion."); MO at 5 ("*[U]pon payment* of the Cure Amount Debtor's Motion [to Assume] *should be approved* by the Court, *provided* the Debtor can show adequate assurance of future performance.") (emphasis added). These statements plainly demonstrate that payment of the Cure Amount was a condition precedent to Transcom's assumption of the Master Agreement. The fulfillment of that condition was no idle requirement – payment of the Cure Amount necessarily played an integral part of the bankruptcy court's finding that Transcom had met the statutory requirements to assume the contract. Section 365(b)(1) provides that a debtor cannot assume an executory contract unless it either cures its default or provides adequate assurance that such default will promptly be cured. Transcom's failure to pay the Cure Amount within the time frame specified by the bankruptcy court undermines the satisfaction of those requirements. Although the bankruptcy court did not specify the exact consequences that would result if Transcom failed to timely pay the Cure Amount, one thing is certain – under the bankruptcy court's rulings and § 365,

Transcom has not assumed the contract, nor can it at this time.[3] Its inability to do so renders moot the primary issue made the basis of the present appeal – whether the bankruptcy court exceeded its jurisdiction in deciding that Transcom is an ESP – for the bankruptcy court's resolution of that issue was necessarily predicated on its assumption that Transcom would be able to cure its default in accordance with § 365. *See* In re *Burrell*, 415 F.3d 994, 996-97 (9th Cir. 2005) (holding appellant's claims for denial of discharge of debt mooted by bankruptcy court's denial of discharge during pendency of appeal before the district court). At this point any opinion by this Court on the question of whether the bankruptcy court acted correctly in examining Transcom's ESP status would constitute nothing more than an impermissible advisory opinion.

Transcom contends that it was not obligated to comply with the bankruptcy court's order to pay the Cure Amount within 10 days because that order was appealed.[4] Not so. As AT&T points out, "[t]he taking of an appeal does not by itself suspend the operation or execution of a district-court judgment or order during the pendency of an appeal." 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3954. If Transcom desired to suspend the operation of the bankruptcy court's order it could have moved for a stay of that order, but it did not.

Having found that the subject of the present appeal is moot, the Court will now examine whether it should vacate the bankruptcy court's order.[5] "The Supreme Court has recognized that

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[3] The Court has no opinion on whether Transcom could assume the Master Agreement upon potential re-application to do so before the bankruptcy court.

[4] The Court notes that Transcom does not argue that any of the recognized exceptions to the mootness doctrine apply.

[5] Although Transcom challenged AT&T's argument that this appeal is moot, it offered no argument or authority showing that vacatur of the bankruptcy court's order would be improper in the event the Court found the appeal moot.

because of the unfairness of the enduring preclusive effect[6] of an unreviewable decision in the case of a civil action that has become moot on appeal, '[t]he established practice of the Court . . . is to reverse or vacate the judgment below and remand with a direction to dismiss.'" In re *Burrell*, 415 F.3d at 999 (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Vacatur is a creature of equity, and, as such, it may be inappropriately applied where the appellant causes the dismissal of the appeal through his own actions. *Id.* On the other hand, vacatur may be appropriate "when mootness results from unilateral action of the party who prevailed below." *U.S. Bancorp Mortgage Co. v. Bonner Mall P'Ship*, 513 U.S. 16, 25 (1994). Here it was Transcom, not the Appellants, that rendered the appeal moot by failing to comply with the bankruptcy court's order. In re *Burrell*, 415 F.3d at 998 (vacating bankruptcy court judgment where appellee, not appellant, rendered appeal moot by its failure to comply with settlement conditions). Thus, because Transcom caused this appeal to become moot and because the bankruptcy court's order, even if not preclusive, is prejudicial to AT&T, the Court finds that the bankruptcy court's Memorandum Opinion and order should be vacated. *Mississippi Power & Light Co. v. Fed. Energy Regulatory Comm'n*, 724 F.2d 1197, 1198 (5th Cir. 1984) (directing Federal Energy Regulatory Commission to vacate order "as moot so that it will spawn no further legal consequences or prejudice the rights of the parties in future litigation.").

## III. Conclusion

For the reasons stated above, the Court GRANTS AT&T's Motion to Dismiss. The appeal from the Bankruptcy Court for the Northern District of Texas, Dallas Division, No. 3:05-CV-1209-B

[6] This Court does not opine on whether the bankruptcy court's rulings have any preclusive effect.

is accordingly DISMISSED as moot. The bankruptcy court's Memorandum Opinion and Order Granting Debtor's Motion to Assume, both entered April 28, 2005, are VACATED.

**SO ORDERED**.

**SIGNED January 20th , 2006**

**JANE J. BOYLE**
**UNITED STATES DISTRICT JUDGE**